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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Northland Organic Foods Corp.

Serial No. 75643324

Jana L. France of Fish & Richardson P.C., P.A. for Northland Organic Foods Corp.

Christopher S. Adkins, Trademark Examining Attorney, Law Office 116 (Meryl L. Hershkowitz, Managing Attorney).

Before Seeherman, Hohein and Rogers, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Northland Organic Foods Corp. has filed an application to register on the Principal Register the mark "NORTHLAND ORGANIC FOODS," in standard character form, for "brokerage [services] in the field of oils, agricultural seeds and unprocessed grain."[1]

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its services, so resembles the mark "NORTHLAND," in standard character form, which is registered

[1] Ser. No. 75643324, filed on February 17, 1999, which is based on an allegation of a date of first use anywhere and in commerce of June 1, 1998. The words "ORGANIC FOOD" are disclaimed, even though applicant's mark includes the word "FOODS" rather than "FOOD."

for "seeds,"[2] as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations which are usually involved are the similarity or dissimilarity in the goods and/or services at issue and the similarity or dissimilarity of the respective marks in their entireties.[3]

Turning to the latter consideration first, applicant argues in its brief that, among other things, the Examining Attorney has improperly dissected the respective marks by focusing on the fact that they "share only <u>one</u> common component--the word 'NORTHLAND.'" Applicant maintains, however, that "[w]hen viewed holistically, the marks are visually and

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[2] Reg. No. 104,566 issued on the Principal Register on June 1, 1915, which sets forth a date of first use anywhere and in commerce of December 15, 1914; fifth renewal.

[3] The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and/or services] and differences in the marks." 192 USPQ at 29.

phonetically distinguishable and that, because the term "ORGANIC FOODS" in applicant's mark "is distinctive" and hence "is not descriptive" of applicant's "brokering services," it consequently "is not a weak component of Applicant's mark that should be overlooked or minimized" in comparison to registrant's mark. Applicant also asserts that because "the only shared component of the marks at issue is the word 'northland,'" which it further notes is defined in the record by Merriam-Webster's Collegiate Dictionary (10th ed. 1998) at 793 as "a common word in the English language meaning 'land in the north' or 'the north of a country,'" such word should be regarded as a "geographically suggestive element" of its mark. Applicant insists that since registrant's mark is likewise geographically suggestive, the respective marks are weak and thus, the coupling in its mark of the term "NORTHLAND" with the words "ORGANIC FOODS" "is more than sufficient to dispel a likelihood of confusion."

The Examining Attorney, on the other hand, contends in his brief that he "has taken into consideration the additional terminology 'ORGANIC FOODS' in the applicant's mark," but finds that "'ORGANIC FOODS' are commonly used words that merely describe the actual services of the applicant" inasmuch as such services "directly deal in organic foods." In consequence thereof, the Examining Attorney maintains that the term "NORTHLAND" is the dominant and distinguishing feature of applicant's mark. Accordingly, when the respective marks are considered in their entireties, the Examining Attorney asserts

that they are not only "extremely similar in appearance, sound ... and connotation," but that they engender essentially the same overall commercial impression, "thereby creating an extremely strong likelihood of confusion."

While it is indeed the case that the marks at issue must be considered in their entireties, including any descriptive matter forming part of a mark, our principal reviewing court has indicated that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, according to the court, "that a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark ...." Id.

Here, rather than being an inherently or otherwise "distinctive" component of applicant's "NORTHLAND ORGANIC FOODS" mark, it is obvious that the phrase "ORGANIC FOODS" is at least highly descriptive of, if not a generic term for, any kind of organic foods brokerage service, including the brokerage services offered by applicant in the field of such organic foods as oils, agricultural seeds and unprocessed grain. We therefore agree with the Examining Attorney that, when applicant's mark is considered in its entirety, the dominant and distinguishing

portion thereof is the word "NORTHLAND," which is identical to registrant's mark. Overall, applicant's and registrant's marks accordingly are substantially similar in sound, appearance and connotation. Moreover, even if the word "NORTHLAND," as argued by applicant, is considered a weak term due to its geographical suggestiveness as applied to the goods and services at issue herein, it is still the case that, in their entireties, applicant's "NORTHLAND ORGANIC FOODS" mark and registrant's "NORTHLAND" mark engender essentially the same commercial impression. If such marks, therefore, are used in connection with commercially related goods and services, confusion as to the source or affiliation thereof would be likely to occur.

Focusing, then, on the goods and services at issue herein, applicant maintains in its brief that its brokerage services in the field of oils, agricultural seeds and unprocessed grain are "unrelated to the 'seeds' covered by the cited registration." Applicant, in particular, notes that the Examining Attorney, in an effort to support his position that such goods and services are related, has made of record copies of "20 [third-party] registrations that cover goods and the wholesale distribution of those goods." Applicant accurately observes, however, that:

> Notably, not one of these registrations covers the distribution of goods related to the goods Applicant ... brokers. The Examining Attorney did not cite a single registration covering oils, seeds, and/or grain and the wholesale ... brokering of such goods. As such, the Examining Attorney's own evidence indicates that consumers do not expect a seed seller such as the registrant

> to offer wholesale ... brokering ... of oils, agricultural seeds, and unprocessed grain.

Applicant also asserts that although "[t]he cited registration covers 'seeds,' ... registrant's use of its mark is limited to lawn seeds," that is, grass seeds, as shown by the information which applicant has made of record. Applicant consequently concludes that "[t]he goods and services on their face are sufficiently dissimilar and the record does not contain any evidence to suggest that these goods and services are related."

In addition, applicant contends that "[s]ignificant differences exist between the channels of trade" in which its services and registrant's goods are offered and that, "[s]imilarly, the class of purchaser interested in applicant's services differs from the class of purchaser interested in registrant's goods." Applicant argues, in this regard, that:

> [T]here is no convincing evidence that the purchasers of registrant's goods are likely to encounter Applicant's mark. Applicant's services are specifically limited to the wholesale channel of trade. End users of seeds do not encounter services relating to the wholesale ... brokering of such seeds. The only parties that potentially could encounter both Applicant's mark and registrant's mark are wholesale or retail purchasers, who are professional purchasers knowledgeable of the products and services offered in the field and the sources of those products and services. ....
>
> The Examining Attorney bears the burden of showing that the registrant's goods are offered to the same limited class of purchasers interested or potentially interested in Applicant's wholesale ... brokering services. [Citation omitted.] In support of his position that the parties do not operate in separate channels of trade, the Examining Attorney cites the previously

> discussed [third-party] registrations covering particular goods and the distribution of those goods. .... As previously discussed, however, not one of those ... registrations relate[s] to the goods offered by registrant or the goods distributed by Applicant. The record simply does not contain any convincing evidence that the ultimate purchasers of registrant's goods will encounter Applicant's mark or vice versa. The Examining [Attorney] has failed to meet his burden of showing that the channels of trade and classes of purchasers overlap, and the evidence of record establishes the contrary. As such this factor favors a finding of no likelihood of confusion.

Furthermore, as to the classes of purchasers for the respective goods and services, applicant urges that because it renders its brokerage services under its "NORTHLAND ORGANIC FOODS" mark to knowledgeable and sophisticated customers, confusion as to the origin or sponsorship thereof is unlikely with the seeds sold by registrant under its "NORTHLAND" mark. Specifically, according to applicant:

> Applicant is in the business of wholesale ... brokering of a variety of organic commodities. Applicant offers its wholesale ... brokering services to growers of organic commodities seeking to sell their commodities, and to businesses such as organic food producers interested in purchasing organic ingredients. Organic commodity growers and purchasers are professional, discriminating purchasers who exercise thought and deliberation before utilizing Applicant's services. For example, [o]rganic growers typically submit samples of their commodities to Applicant, and based on the samples submitted Applicant decides whether to ... broker the grower's commodities. Organic food producers learn about Applicant and the commodities it offers at organic food trade shows. As such Applicant's services are rendered to those professional purchasers who have deliberately

> chosen to work with Applicant. The business model used by Applicant eliminates any possible confusion.

The Examining Attorney, on the other hand, insists in his brief that applicant's services and registrant's goods are "highly related," pointing out among other things that, along with the previously noted copies of "several third[-]party U.S. Registrations ... providing general demonstrations of the commonality in which goods and distributorship or brokerage services for those goods are listed under the identical trade name," he has also made of record a copy of "U.S. Registration No. 2415049." The Examining Attorney urges that such third-party registration, which we observe is based on a foreign registration rather than use in commerce, evidences the relatedness of applicant's brokerage services for agricultural seeds, on the one hand, and registrant's seeds, on the other, because such registration lists both "'seeds' and highly similar distributorship services for seeds," which the Examining Attorney asserts are "highly analogous to the [applicant's] brokerage services."

It is settled that while use-based third-party registrations are not evidence that the different marks shown therein are in use or that the public is familiar with them, such registrations may nevertheless have some probative value to the extent that they serve to suggest that the services and goods listed therein are of the kinds which may emanate from a single source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993); and In re Mucky Duck Mustard Co. Inc.,

6 USPQ2d 1467, 1470 at n.6 (TTAB 1988), *aff'd as not citable precedent*, No. 88-1444 (Fed. Cir. Nov. 14, 1988). However, as noted earlier, none of the third-party registrations made of record by the Examining Attorney has any probative value in this regard inasmuch as none of such registrations is for the same goods and services which are at issue herein. Moreover, as to Registration No. 2,415,049, which is specifically relied upon by the Examining Attorney, such registration further lacks probative value because it is not based on use in commerce.

The Examining Attorney also relies, as evidence of the relatedness of applicant's services and registrant's goods, upon the advertising which applicant submitted as specimens of use of its mark for its brokerage services. Specifically, applicant's advertising states, *inter alia*, that (emphasis added):

> At Northland, we are committed to providing the highest quality, nutritious, certified organic food to our customers and to providing environmentally sound, sustainable agriculture.
>
> **With years of experience as a leading organic food brokerage company, Northland specializes in the production and exportation of** premium quality, Non-Genetically Modified, organic soybeans, wheat, corn, rice and other cereal grains as well as **certified organic commodities** such as oils, meals and flours.
>
> It is Northland's priority to carefully oversee the entire production cycle, from the soil preparation and seed stock to the harvest, processing, packaging and transport which insures the integrity of our products. Northland ... markets only those commodities which meet strict organic standards.

In view thereof, and because "the registrant's goods are ... considered to be identical to the applicant's goods that

are dealt in via its brokerage services" since the "seeds" identified in registrant's registration must be presumed to include the "agricultural seeds" set forth in applicant's recitation of its brokerage services, the Examining Attorney concludes that the goods and services at issue herein are highly related. The contemporaneous sale thereof, under the respective marks, is therefore likely to cause confusion, according to the Examining Attorney, and the fact that applicant's customers may indeed be knowledgeable and sophisticated purchasers, he insists, does not mean that they would be "immune from confusion when the marks are as similar as these marks."

While applicant's advertising indicates that applicant, in addition to its "years of experience as a leading organic food brokerage company, ... specializes in the production and exportation of premium quality, Non-Genetically Modified, organic soybeans, wheat, corn, rice and other cereal grains as well as certified organic commodities such as oils, meals and flours," it does not appear that such goods would be considered to include those for use as "agricultural seeds" instead of as organic foodstuffs. Nonetheless, we concur with the Examining Attorney that applicant's services and registrant's goods, as identified, must be considered commercially related and that their marketing under, respectively, the substantially similar marks "NORTHLAND ORGANIC FOODS" and "NORTHLAND" is likely to cause confusion.

As the Examining Attorney correctly notes, it is well settled that the issue of likelihood of confusion must be determined on the basis of the services and goods as they are

respectively set forth in the particular application and the cited registration, and not in light of what such services and goods are shown or asserted to actually be. See, e.g., Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987); CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Thus, in the absence of any restriction in an application or registration as to the channels of trade or any limitation as to the classes of purchasers, it is presumed that in scope the identification of goods or recitation of services encompasses not only all services and/or goods of the nature and type described therein, but that the identified services and/or goods are provided in all channels of trade which would be normal therefor, and that they would be purchased by all potential buyers thereof. See, e.g., In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

Applying these principles, the Examining Attorney is correct that registrant's broadly identified "seeds" must be deemed to encompass all kinds of seeds, including "agricultural seeds," of which the latter are among the goods which are the subjects of applicant's brokerage services. In addition, applicant acknowledges that the parties who "potentially could encounter both Applicant's mark and registrant's mark are

wholesale or retail purchasers." Applicant further acknowledges that it offers its brokerage services "to businesses such as organic food producers interested in purchasing organic ingredients." Accordingly, both applicant's services and registrant's goods would be provided to the same classes of purchasers.

Moreover, while such purchasers would no doubt be sophisticated in that they would be knowledgeable as to their needs and would buy, for instance, agricultural seeds from brokers thereof or independent producers only after careful consideration, it nevertheless is well settled that the fact that buyers may exercise deliberation in choosing such goods "does not necessarily preclude their mistaking one trademark [or service mark] for another" or that they otherwise are entirely immune from confusion as to source or sponsorship. Wincharger Corp. v. Rinco, Inc., 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also In re Decombe, 9 USPQ2d 1812, 1814-15 (TTAB 1988); and In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983). Such would especially be the case where, as here, the marks at issue are so substantially similar.

Finally, notwithstanding the above, applicant argues that confusion is not likely because, as attested in the following quotations from the declaration which it made of record of its president, applicant "has used the mark NORTHLAND ORGANIC FOODS to signify its food products ... since at least as early as 1992" and "[a]pplicant and its employees are unaware of any actual confusion between the cited NORTHLAND mark and applicant's

products." Applicant maintains that a period of "ten-plus years of coexistence without evidence of actual confusion strongly suggest[s] that Applicant's mark is not likely to be confused with the cited mark."

The Examining Attorney, in response, states that because "the applicant's mark and registrant's mark are extremely similar and the goods and services (dealing with identical goods) are additionally highly similar," that applicant's claim of the absence of any "documented cases of actual confusion between the applicant's mark and the registrant's mark" is "unpersuasive." The Examining Attorney also points out that "the test under Section 2(d) of the Trademark Act is whether there is a likelihood of confusion and, citing Weiss Associates Inc. v. HRL Associates Inc., 902 F.2d 1546, 14 USPQ2d 1840, 1842-43 (Fed. Cir. 1990) and cases cited therein, notes that "[i]t is unnecessary to show actual confusion in establishing likelihood of confusion."

While it is indeed the case that evidence of the absence of any instances of actual confusion over a significant period of time is a *du Pont* factor which is indicative of no likelihood of confusion, such is a meaningful factor only where the record demonstrates appreciable and continuous use by applicant of its mark in the same markets as those served by registrant under its mark. See, e.g., Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768, 1774 (TTAB 1992). In particular, there must be evidence showing that there has been an opportunity for incidents of actual confusion to occur. See, e.g.,

Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000). Here, however, there is no such evidence. Instead, while the declaration of applicant's president includes the amounts of its "sales of commercial seed products" (in the range of from nearly two million dollars to almost four million dollars annually) for the years from 1994 to 1999, there is no information as to the amounts of registrant's sales of its seeds. Furthermore, the declaration of applicant's president significantly states that applicant "understands that the [mark of the] cited NORTHLAND registration is used exclusively upon grass seeds"; that applicant "is aware of no use by the owner of the cited [registration of the mark NORTHLAND] upon any other goods"; and that applicant's "products do not include grass seeds or any other landscaping or consumer oriented product." It is therefore plain that the lack of any known instances of actual confusion is without any probative value with respect to the issue of likelihood of confusion inasmuch as there apparently has been no actual use by registrant of its mark in connection with "agricultural seeds" of the kinds marketed by applicant to, for example, organic food producers, even though, as indicated previously, registrant's "seeds" must be broadly regarded as including such agricultural seeds for purposes of assessing whether there is a likelihood of confusion.

We accordingly conclude that purchasers who are familiar or acquainted with registrant's "NORTHLAND" mark for "seeds," including in particular "agricultural seeds," would be likely to believe, upon encountering applicant's substantially

similar "NORTHLAND ORGANIC FOODS" mark for "brokerage [services] in the field of oils, agricultural seeds and unprocessed grain," that such commercially related goods and services emanate from, or are sponsored by or associated with, the same source.

Decision: The refusal under Section 2(d) is affirmed.